(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: JUN 10 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal from that decision. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will dismiss the motion.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a biomedical researcher. At the time of filing, the petitioner was a part-time "volunteer clinical research/data assistant" at [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found, and the AAO agreed, that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On motion, the petitioner submits a statement and copies of two electronic mail messages.

Any motion to reconsider an action by USCIS filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner. 8 C.F.R. § 103.5(a)(1)(i).

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer –

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner filed the Form I-140 petition on June 27, 2011. The director denied the petition on April 26, 2012, and the AAO dismissed the petitioner's appeal on November 14, 2012. In that decision, the AAO stated:

> The record establishes that the petitioner is a capable researcher who has made a favorable impression on his collaborators, employers and mentors. The intrinsic merit and national scope of biomedical research are not in dispute. Nevertheless, the evidence submitted does not show that the petitioner's work stands out from that of his peers. In the absence of evidence of publication, the record does not show that the petitioner's work has even come to the attention of other researchers except those who attended certain conferences. Witnesses have asserted that the petitioner's work may affect public health planning measures and treatment of heart attack patients, but the record does not show that the petitioner's work has yet had those effects. Speculation about the possible future impact of the petitioner's work is conjecture, not evidence, and cannot establish eligibility for the national interest waiver.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) affords the petitioner 30 days to file a motion to reopen and/or reconsider the AAO's decision. Because the AAO served its notice by mail, the regulation at 8 C.F.R. § 103.8(b) added three days to the response period. Under the regulation at 8 C.F.R. § 103.2(a)(7), the filing date is the date USCIS received the motion, not the date of mailing.

Because the AAO issued its decision on November 14, 2012, the filing deadline for the petitioner's motion was 33 days later, December 17, 2012. The petitioner prepared Form I-290B, Notice of Appeal or Motion, on December 12, 2012, but he did not file the motion at that time. One of the exhibits submitted on motion is dated December 20, 2012, three days after the filing deadline, and the petitioner mailed the motion in an envelope postmarked December 24, 2012. USCIS received the motion on December 31, 2012, two weeks after the filing deadline.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) allows for the acceptance of an untimely motion to reopen under some circumstances, but there is no comparable allowance for an untimely motion to reconsider. The AAO must, therefore, dismiss the motion to reconsider as untimely.

With respect to the concurrent motion to reopen, the cited regulation states that untimely filing may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner. In this instance, the petitioner had prepared the motion during the allotted time, but failed to mail it for 12 days after he signed and dated it. Because the

petitioner wrote his statement before the filing deadline, that statement included no explanation as to why the delay in filing was beyond his control. The AAO will, therefore, dismiss the motion to reopen as untimely.

The petitioner's submission on motion includes printouts of two electronic mail messages from the editorial office of the [redacted] The petitioner states that these messages constitute "preliminary corroborative testimonial and documentary evidence in support of [his] claims as a researcher in the medical profession."

The first printout, dated November 14, 2012, confirmed that a manuscript, naming the petitioner as a co-author, "has been submitted . . . to the [redacted] The second message, dated December 20, 2012, indicated that the manuscript "has been proceeded [*sic*] to peer review and is currently being given full consideration for publication in the [redacted]

The messages do not show that the AAO was incorrect in referring to "the absence of evidence of publication." The new printouts show that the petitioner submitted a manuscript while his appeal was already pending. In the dismissal notice, the AAO cited a regulation and a precedent decision:

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The newly submitted printouts do not show that the petitioner was eligible for the requested benefit at the time he filed the petition on June 27, 2011. The submission of a manuscript in November 2012 cannot show that the petitioner was eligible for the benefit sought in July 2011, or that the director or the AAO made incorrect decisions based on the evidence available at the time.

The petitioner's motion alleges no error in the AAO's decision, and it does not show that the AAO made the wrong decision based on the evidence available to the AAO at the time of its decision. Therefore, the motion, even if it were timely, does not the requirements of a motion to reconsider under the regulation at 8 C.F.R. § 103.5(a)(3).

The printouts submitted on motion, while "new" in the sense that they did not exist at the time of the AAO's decision, do not establish the petitioner's eligibility at the time he filed the petition. *See* 8 C.F.R. § 103.2(b)(1). The AAO had previously advised the petitioner that he had to establish eligibility at the time of filing.

Because the petitioner's filing does not meet the requirements of a motion to reopen or a motion to reconsider, the USCIS regulation at 8 C.F.R. § 103.5(a)(4) requires the AAO to dismiss the motion.

ORDER: The motion is dismissed.